Fessler & Bowman, Inc. *and* Local 9, International Union of Bricklayers & Allied Craftworkers, AFL–CIO, Petitioner and Local 16, Operative Plasterers' & Cement Masons' International Association, AFL–CIO. Case 7–RC–22434

May 12, 2004

DECISION AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, WALSH, SCHAUMBER

The issue in this case is whether a party's collection of ballots in a Board-conducted mail ballot representation election is objectionable. Contrary to the hearing officer, we find that the Union engaged in objectionable conduct by collecting two employees' mail ballots.

For the reasons explained below, we announce a new rule that any party's collection of mail ballots constitutes objectionable conduct that may warrant setting aside an election.

I. BACKGROUND

The National Labor Relations Board[1] has considered objections to a runoff mail-ballot election held between July 24 and August 18, 2003,[2] and the hearing officer's report recommending disposition of them. The runoff election was conducted pursuant to a Stipulated Election Agreement. The tally in the runoff election shows 19 votes for Local 16, Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL–CIO (the Union), and 15 votes for Local 9, International Union of Bricklayers and Allied Craftworkers, AFL–CIO (the Petitioner), with 2 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the hearing officer's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.[3]

II. FACTS

The relevant facts are undisputed. On March 28, the Petitioner filed a petition to represent a unit of employees who were then represented by the Union. Pursuant to a Stipulated Election Agreement, the Board conducted a mail-ballot election held between May 14 and June 9. The Petitioner and the Union each received 12 votes, and no votes were cast against representation. Because neither union garnered a majority of votes, the Regional Director ordered a runoff election.

After the Regional Office mailed out the ballot kits[4] for the runoff election, a Union agent telephoned employee Frank Deming at home and asked Deming to bring his ballot to the jobsite. Some unspecified time later, Union Business Agent Greg DeJongh went to the Fenton, Michigan jobsite to distribute Union T-shirts. Deming said to DeJongh, "Hey, I got something." Deming told DeJongh to wait and Deming went to his truck and retrieved his mail ballot. Deming returned and handed the ballot, which was sealed inside the return envelope supplied by the Board, to DeJongh. DeJongh took Deming's sealed mail ballot, put it in his truck, and continued to talk to employees at the jobsite. DeJongh went to a post office several hours later and mailed Deming's ballot. DeJongh testified that he did not look at or tamper with the ballot before mailing it. Greg Lobodzinski, a business agent for the Petitioner, learned, before the ballot count, that the Union had collected Deming's ballot.

On a separate occasion, an individual identifying himself as a Union agent approached employee Dave Gardyszewski at Fessler & Bowman's Lansing, Michigan jobsite and asked Gardyszewski if he had voted. Gardyszewski responded that he had voted, noting that his ballot was in his truck. The Union agent then said, "I could hand it in for you, if you want." Gardyszewski retrieved his sealed ballot from his truck and handed it to the Union agent. Gardyszewski testified that he had not received any telephone calls offering to collect his ballot before his contact with the Union agent at the Lansing jobsite. Tom Payne, a former agent of the Petitioner, learned, before the ballot count, that the Union had collected Gardyszewski's ballot.

Also during the period of the mail-ballot runoff election, an individual identifying himself as a Union agent telephoned employee Raymond Turner. The Union

[1] Member Meisburg has recused himself and took no part in the consideration of this case.

[2] All dates refer to 2003, unless otherwise noted.

[3] No party excepted to the hearing officer's recommendations to overrule the Petitioner's Objections 2, 3, and 4.

[4] A ballot kit customarily includes Form NLRB-4175, Instructions to Eligible Employees Voting By United States Mail. The record is silent on whether the ballot kits in this case contained Form NLRB-4175. The Instructions direct voters to:

1. Mark your ballot in secret by placing an *X* in the appropriate box. Make no other marks on your ballot.
2. It is important to maintain the secrecy of your ballot. Do not show your ballot to anyone after you have marked it.
3. Put your ballot in the blue envelope and seal the envelope.
4. Put the blue envelope containing the ballot into the yellow addressed return envelope.
5. Sign the back of the yellow return envelope in the space provided.
6. Mail immediately. No postage required.

agent asked Turner which jobsite he would be working at the next day and offered to come out to that jobsite and pick up Turner's ballot. The Union agent further encouraged Turner to ask his fellow employees to bring in their ballots for collection. Turner declined the Union agent's offers.

Additionally, Union Agent Greg Brisboy informed employee Mark McDermaid that he was trying to collect mail ballots from the voters. At the time of this conversation, McDermaid had already mailed his ballot to the Regional Office, and he so informed Brisboy. Brisboy telephoned employee Don Rowley and made a similar offer. Rowley told Brisboy that he had already mailed in his ballot.

Word of the Union's conduct spread among the employees during the voting period. Deming told "the boys on the crew," including employees James Kiel and Craig Woodley, that the Union had collected his ballot. Gardyszewski told employee Tom Payne that the Union had collected his ballot. In turn, Payne discussed the ballot collection with employees Bobby Atkins and Bud Godfrey. Likewise, Turner told employee John Smith that the Union had solicited his ballot.

The deadline for returning mail ballots was August 18. The tally of ballots showed 19 votes for the Union and 15 votes for the Petitioner, with 2 challenged ballots.[5] The Petitioner timely filed an objection alleging that the Union interfered with the election by soliciting employees' ballots and by collecting Deming's and Gardyszewski's ballots.

III. HEARING OFFICER'S REPORT ON OBJECTIONS

The hearing officer found that the Union's solicitation of ballots and its ballot collection did not constitute objectionable conduct. She found that the ballots were sealed when given to the Union's agents and that there was no evidence of ballot tampering.

The hearing officer also found no evidence that the Union's conduct compromised the secrecy of the mail ballots or that the Union's solicitations to collect ballots placed any undue pressure on the voters. Under these circumstances the hearing officer found that the Union's ballot collection and solicitations did not taint the election's laboratory conditions. As set forth below, we disagree.

IV. ANALYSIS

It is well settled that the Board, in conducting elections, must maintain and protect the integrity and neutrality of its procedures. See, e.g., *Family Service Agency, San Francisco*, 331 NLRB 850 (2000); *Glacier Packing Co.*, 210 NLRB 571 (1974). Because of the fundamental importance of this process, the election environment must be one in which employees may freely and fairly express their views regarding representation. To this end, the Board has stated that election conditions must approach, as nearly as possible, ideal "laboratory" conditions so as to facilitate expression of the uninhibited wishes of the employees. *General Shoe Corp.*, 77 NLRB 124, 127 (1948). "[T]he Board goes to great lengths to ensure that the manner in which an election was conducted raises no reasonable doubt as to the fairness and validity of the election." *Jakel, Inc.*, 293 NLRB 615, 616 (1989). Further, Section 7 of the Act assures employees the basic right to choose whether or not they wish to be represented by a labor organization for collective bargaining purposes. Board-conducted elections support such a right by providing a forum where employees may freely express their representation choices via secret ballot.

In a manual ballot election, employees cast their ballots in secret, and then directly deposit those ballots in the ballot box. Board agents are present to supervise the election process. Whenever there is an appearance of irregularity in the handling of ballots in a manual ballot election, the Board has not hesitated to find the conduct objectionable. See, e.g., *Paprikas Fono*, 273 NLRB 1326, 1328 (1984) ("[I]f this Agency is to maintain the public's confidence in its election processes, it is imperative that the Board act dutifully to set aside elections whenever there is any appearance of irregularity in the handling of ballots.").

In *Tidelands Marine Services*, 116 NLRB 1222 (1956), the Board set aside a manual election where one party's representative had extended access to an unsealed ballot box even though a Board agent was present and there was no evidence to indicate that anyone had tampered with the ballot box. In that case, the Board found that the party's access to the ballots "constitute[d] such a serious irregularity in the conduct of the election as to raise doubts as to its integrity and secrecy." Id. at 1224.

In mail-ballot elections, of course, a Board agent is not present when the ballots are marked and returned by mail. *Thompson Roofing, Inc.*, 291 NLRB 743 fn. 1 (1988); *Mission Industries*, 283 NLRB 1027 (1987). For this reason, mail ballots are accompanied by election kits that clearly specify the precise procedure for casting and returning the ballot. Where such procedures are not followed, and the mail ballots come into the possession of a party to the election, the secrecy of the ballot and the integrity of the election process are called into question. The Board identified these concerns in *London's Farm*

[5] Neither of the collected ballots was challenged. Two uncollected ballots were challenged on other grounds.

Dairy, 323 NLRB 1057 (1997). In that case, the Board rejected the argument that holding an election by mail ballot likely would undermine its secrecy. In so holding, the Board noted that the instances of abuse in Board mail-ballot elections were almost nonexistent, and that, in the long history of mail-ballot elections under the Railway Labor Act, the instances of alleged improprieties, including "alleged 'ballot collection' and consequent invasion of privacy," were rare. Id. at 1058, citing *United Air Lines*, 22 NMB No. 82 (1995).

We agree with the proposition that the secrecy of balloting—be it manual or mail ballot—is a hallmark of our election procedures. Where mail-ballot collection by a party occurs, we find that it casts doubt on the integrity of the election process and undermines election secrecy. For this reason, we hold that where a party collects or otherwise handles voters' mail ballots, that conduct is objectionable and may be a basis for setting aside the election.[6] We shall also revise the instructions in NLRB Form-4175 to reflect this new standard.

In this case, one party to the election obtained exclusive control of two voters' mail ballots for an extended period of time after they were cast. Such conduct casts doubt on the validity of these two ballots. We therefore find, in disagreement with the hearing officer, that the Union engaged in objectionable conduct by collecting the ballots of Deming and Gardyszewski.[7]

Contrary to our colleagues, however, we find that the Union's solicitation of voters' ballots did not constitute objectionable conduct. The solicitation in this case does not implicate the same concerns that cause us to find the ballot collection objectionable. Unlike the ballot collection, the solicitation of ballots did not create an opportunity for ballot tampering or for a breach of secrecy. Accordingly, solicitation alone does not cast doubt on the secrecy of the employees' ballots or the integrity of the election process.

Our colleagues, who would find the solicitation objectionable, fail to identify any harm that the solicitation, by itself, inflicts on the integrity of the election process. They do not suggest that solicitation creates an opportunity for tampering or for a breach of secrecy. Nor do our colleagues suggest that ballot solicitation interferes in any way with employee free choice. Nevertheless, they criticize us for failing to condemn as objectionable "[a]ny effort" to collect ballots, even those that prove unsuccessful, such as mere solicitation. Few elections would withstand scrutiny if the Board were to set them aside based on conduct that does not inflict actual harm on the election process.

Our colleagues would find solicitation objectionable because it forces an employee to either decline the solicitation and therefore be viewed a disfavoring the solicitor, or comply with the solicitation and therefore worry about the secrecy of his or her ballot. Only the second option in this purported Hobson's choice identifies a legitimate threat to election integrity, and that threat is dissipated by the rule against ballot collection. Obviously, if an employee complies with a solicitation, his ballot will have been collected; and under the rule we announce today, the Board will find the solicitor's conduct objectionable. The first option does not identify a harm cognizable under the Act. Our colleagues are concerned that solicited employees will fear being viewed as dissenters if they decline the solicitation. Under well-established Board law, however, union conduct that causes an employee to signal his favor or disfavor of the union does not, without more, constitute objectionable conduct. Specifically, a union may ask employees whether they favor the union so long as it does not coerce employees while conducting its poll. *Kusan Mfg. Co.*, 267 NLRB 740, 746 (1983), enfd. 749 F.2d 362 (6th Cir. 1984); *J.C. Penney Food Dept.*, 195 NLRB 921, 922 fn. 4 (1972), enfd. 82 LRRM (BNA) 2173 (7th Cir. 1972) (per curium). Surely, an employee's fear of being viewed as a dissenter is no greater when he declines a union's ballot solicitation than when he responds negatively (or remains silent) during a union-conducted poll.

Our colleagues find the polling analogy "inapt" because, in their view, solicitation, unlike polling, "interferes with the Board's role in conducting secret ballot elections" and thus "impugns the secrecy and integrity of the election process." We disagree. Again, there is no electoral interference, and no threat to ballot secrecy or election integrity, unless ballots are actually collected. Our colleagues also suggest that unless ballot solicitation is held independently objectionable, "undetectable" ballot collection will occur. We have reasonable confidence that the diligence and acumen of the Board's regional investigators is more than adequate to obviate this speculative concern.

Although we hold that a party's noncoercive solicitation of mail ballots does not constitute objectionable conduct, we express our disapproval of this practice. We are confident that our holding today, which prohibits

[6] In *Pacific Gas & Electric Co.*, 89 NLRB 938 (1950), the Board overruled objections to an election in which union agents and employer supervisors collected mail ballots from employees and forwarded them to the Regional Office. We overrule *Pacific Gas & Electric* to the extent it is inconsistent with our decision today.

[7] We reject the Union's argument that the Petitioner's objection is barred as an untimely postelection challenge filed in the guise of an objection. The Petitioner does not challenge the eligibility of particular voters, but rather argues that the Union's conduct impugned the election's integrity.

parties from collecting or handling mail ballots, removes any incentive for parties to engage in ballot solicitation.

Having determined that the Union engaged in objectionable conduct by collecting Deming's and Gardyszewski's ballots, we turn to an examination of whether this misconduct warrants setting aside the election. The relevant inquiry is whether the objectionable conduct had a tendency to interfere with the employees' freedom of choice and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); see also *Metaldyne Corp.*, 339 NLRB No. 43, slip op. at 1 (2003).

The objectionable conduct in this case involved only two ballots. *Solely* for the purpose of determining whether the Union's objectionable conduct could have affected the election result, we will assume that the two collected ballots were changed from votes for the Petitioner to votes for the Union.

Under this scenario, the Union would have received, in the absence of the objectionable conduct, 17 votes instead of 19 votes, and the Petitioner would have received 17 votes instead of 15 votes, resulting in a 17–17 tie. Thus, based on the current, actual tally (19–15), the Union's objectionable conduct "could well have affected" the election result.

The challenged ballots may change this calculus. Therefore, we must remand this case to the Regional Director to resolve the challenges.[8] If, on remand, the Regional Director sustains both challenges, the election must be set aside.[9] If the Regional Director sustains only one challenge, the election will be set aside if the eligible ballot was cast for the Petitioner, but will stand if it was cast for the Union.[10] If the Regional Director sustains neither challenge, the election will be set aside if at least one of the two eligible ballots was cast for the Petitioner.[11]

ORDER

IT IS ORDERED that Case 7–RC–22434 is remanded to the Regional Director for Region 7 for resolution of the challenged ballots. Thereafter the Regional Director shall take further appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. May 12, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA and MEMBER SCHAUMBER, concurring in part, dissenting in part.

We agree with our colleagues insofar as they establish the principle that a party's collection of mail ballots is objectionable conduct. We disagree in two respects however.

1. While our colleagues hold that a party engages in objectionable conduct if it *collects* ballots, they find it does not do so if it only *solicits* for the collection of those ballots. We disagree. We would bar a party from soliciting or collecting mail ballots.

In essence, our colleagues hold that a party engages in objectionable conduct if it *succeeds* in its effort to collect mail ballots, but does not engage in objectionable conduct if it *fails* in its efforts. In our view, the integrity of the electoral process demands that the employee control his ballot at all times. Any effort to interfere with that process, whether successful or not, undermines the integrity of the process, and is therefore objectionable.

Those considerations apply with particular force to a mail-ballot election. Every effort is made to assure that a mail-ballot election conforms as closely as possible to a manual election. More particularly, that is why Form NLRB-4175 tells the employee to "mail [his ballot] immediately" after marking it.

All of these rules are designed to make it clear that *the Board* controls the election process. There is to be no party intrusion between the voter and the Board. Any party who seeks to come between the voter and the Board undermines that vital principle.

[8] See, e.g., *Buedel Food Products Co.*, 300 NLRB 638 (1990) (remanding case for resolution of challenged ballot to determine whether objectionable conduct could have affected election result).

[9] If the Regional Director sustains both challenges, the tally will remain 19–15. In this event, the Union's objectionable conduct—with its potential for a four-vote swing—could have affected the election result.

[10] If the hearing officer sustains only one challenge, and the eligible ballot was cast for the Petitioner, the Union will have a three-vote margin of victory (19–16). In that event, the objectionable conduct could have affected the election result, and therefore we will set aside the election. If the sole eligible challenged ballot was cast for the Union, the Union will have a five-vote margin of victory (20–15). In that event, the Union's objectionable conduct could not have affected the election result, and therefore the election will stand.

[11] If the Regional Director sustains neither challenge, and the Petitioner and the Union each receive one of the two eligible votes, the Union will have a four-vote margin of victory (20–16). In that event, the objectionable conduct could have affected the election result, and we will therefore set aside the election. If both eligible challenged ballots were cast for the Petitioner, the Union will have only a two-vote margin of victory (19–17). In that event, the objectionable conduct likewise could have affected the election result, and we will therefore set aside the election. If both eligible challenged ballots were cast for the Union, the Union will have a six-vote margin of victory (21–15). In that event, the Union's objectionable conduct could not have affected the election result, and therefore the election will stand.

The most sacred hallmark of a Board election is that employees are guaranteed the secrecy of their ballot. Thus, employees are entitled to an absolute assurance that their ballots will not be seen by any party. A party's solicitation of a marked ballot undermines that assurance. The solicited employee has no way of knowing whether the soliciting party will look at the ballot or not. Concededly, the solicitee can just decline the solicitation. However, where, as here, the solicitation is widespread, there are peer pressures to go along with the request or be viewed as a dissenter. We would not force employees to make that choice.

Our colleagues state their "disapproval" of solicitation. However, they fail to condemn it as objectionable conduct. They say that the ban on collection will prevent the solicitation. We disagree. Those employees who respond negatively to the solicitation are the ones who are most likely to complain about it. Under our colleagues' view, that solicitation will be nonobjectionable. And, those who respond favorably to the solicitation, i.e., those whose ballots are collected, may not want to complain at all. It is reasonable to assume that an employee favors the party to whom he has given his ballot and that the employee may not want to invalidate that party's election victory by later admitting to a hearing officer that his ballot was collected. Thus, under our colleagues' view, a party can solicit, with assurance that an unsuccessful solicitation will not be the basis for a valid objection and with reasonable confidence that a successful solicitation will go undetected.

By contrast, our position ensures that there will be no collection of ballots. Since collection follows a solicitation, a ban on solicitation precludes collection. In sum, inasmuch as a party's solicitation to collect an employee's ballot can intimidate employees and can result in undetectable ballot collection, we would find ballot solicitation to be objectionable.

Our colleagues draw an analogy between ballot solicitation and nonobjectionable union polling. We find this analogy inapt. When union agents conduct polls, they do not attempt to insert themselves into the Board's election machinery. Instead, union pollsters merely ask employees whether they support the union. In contrast, a party who asks an employee to turn over his cast ballot interferes with the Board's role in conducting secret ballot elections. We find that this attempt to interfere with the Board's role impugns the secrecy and integrity of the election process and renders the solicitation objectionable.

We think that the Board should do all in its power to discourage solicitation and collection. Thus, we would make each act objectionable.

2.Contrary to our colleagues' decision to set aside the election only if the collected ballots of employees Deming and Gardyszewski turn out to be determinative of the election result, we would establish a bright-line rule that elections should be set aside, upon the filing of timely objections, whenever a party is shown to have collected or solicited mail ballots. As discussed above, such collection and solicitation constituted objectionable conduct that undermines the integrity of the electoral process itself. Thus, in order to restore that integrity, we would direct a new election, even if it cannot be shown that a particular number of objectionable events were outcome determinative.

However, in the absence of a Board majority to adopt these two positions, we agree with our colleagues to remand the case to the Regional Director to resolve the challenged ballots and to take further appropriate action.

Dated, Washington, D.C. May 12, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD